Volume 25 OCTOBER, 1941 Number 3

Journal *of the* American Judicature Society

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AN EFFICIENT JUDICIAL COUNCIL
IN SOUTH DAKOTA

SUPREME COURT JUSTICES FAVOR INTEGRATION
A SERIES OF LETTERS

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Ann Arbor, Michigan

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JOURNAL OF THE AMERICAN JUDICATURE SOCIETY

Volume 25 OCTOBER, 1941 Number 3

"The Mintage of Man"

By CARL B. RIX

WE RECUR to Housman for prophetic words. In "The Lads of Ludlow" he wrote,

"They shall take back bright to the coiner
the mintage of man,
"The lads that will die in their glory and
never grow old."

We are the witnesses of that of which Housman lived and wrote—the mintage of the English people. The coining of a people is a continuous process, from Magna Charta to Churchill. We see an entire people commanding the admiration of friend and foe and the mintage of people unveils before us. We are glad of our common heritage. When we see a lad of England take wings to eternity or sail a sea which has no harbor, we say again with the poet who knew them so well and loved them—"The lads that will die in their glory and never grow old."

Our thoughts turn, as they must, to our own land. What mintage of man are we coining in our people? We have not the heritage of years, the tradition of generations. We have the Declaration of Independence, the Constitution, the Bill of Rights to guide us. We value highly our inalienable rights, we respect our institutions, the executive, legislative, and judicial. We abhor tyranny in any form. The pretentious claims of superiority of race by the dictators arouse our contempt. The destruction of all civil liberties by autocracy, masquerading as an all-pervading beneficial state, causes us to proclaim those liberties for people everywhere. Our stinging conscience struggles with cold reason. Can they be reconciled?

We have a standard of living far above other peoples. Our culture develops in all forms. We have large stores of the goods of the world and notably of mined gold. What is the *mintage* of *men* from the buried and unburied stores of gold of this country of ours?

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There can be no doubt whatsoever about the fighting stamina of our people in war, or in a period of preparation for defense and aid for others. The productive capacity of our people will be tremendous and overwhelming, but all these things will be of no avail unless we can offer the world a pattern of government, unless we can be the bearer of hope to the nations. What pattern shall they follow in their struggle upward? Aside from the all-important material things of life, what values of self-government will they take from us?

Is it not plain that if we are to claim a real and lasting mintage of man it will be founded upon capacity for self-government? While preparing for war or defense against war our people must set themselves to the problems of the best government for nations.

In this drama the American Bar Association is organizing to play its part. The Civil Liberties committee has demonstrated its great sane capacity and it can be trusted to do its work. The committee on National Defense faces an expanding task, an unknown task. The chairman of that committee sees the Association as the people's lawyer. The text book of the selective service organization bears the imprint of the Association. Machinery has been set up to guarantee that every man in service who needs advice and counsel for himself or his family shall get it promptly without cost. The practice of attorneys in service will be conserved. The draft machinery must be made to function fairly and efficiently. Surveys by lawyers in each locality may be necessary so that the Defense committee may have the facts on which to act.

The committee on Improvement of Administration of Justice is hard at work in all parts of the country strengthening the machinery of justice. Great advances are being made to control administrative practice and procedure. The committee on American Citizenship is again spreading its work. The Junior Bar, through its Public Information committee, is carrying on a great plan of education.

More tasks, harder tasks, loom. Rulers of totalitarian states claim that popular government (such weakness and defects of our system of government) that we cannot survive (in competition with their perfect states). Only time can answer. But this we know, as we struggle with imperfections, as we peer anxiously through the mists, that if we are to prove the falsity of the charge, it will be only if we and those who follow us do the things necessary to make our system work. A vital part of that task is entrusted to us, the maintenance of justice, without which no government should exist.

Again from Housman,

"Get you the sons your fathers got
And God will save the Queen."

Comparatively few persons participate actively in the preparation for defense or in war. The greater part of the population must be able to sustain the burdens. The bombs of civilization drop on them. We speak of the morale of the people—of "building morale." That is why the mintage of man is so overwhelmingly important now. Will we have the morale unless we continue to build it?

The picture becomes clearer. Thomas Mann's "dignity of man" as the essential of democracy is revealed in Housman's bright "mintage of man." We know that only in a democracy which maintains a free system of justice can the dignity of man be upheld. Through all days, in war or peace, the job of our profession is to maintain and improve our system of justice for free men. In that way we create and maintain the "dignity of man," the bright "mintage of man," the right of men, women and children to walk in free air with heads up, thinking, speaking and singing free thoughts.

WHAT WE PREACH is a Chief Judicial Superintendent who shall have the power and duty to inquire into each and every botch product of our judicial system and to take measures to prevent the recurrence of such failures.—*John H. Wigmore.*

Can Courts Perfect Administrative Function?

"A single court responsible for the administration of justice throughout the state and on the job day in and day out, with the power to correct its errors, increase or reduce its staff, improve its methods, would in a few years make the court house a symbol of what every citizen wants it to be and what every citizen now knows it is not."

We quote from Dean Leon Green's original plan of state court organization set forth on another page of this number. But it is only when it is applied to the traditional court structure that the plan can be called original; the plan is substantially that adopted in providing for the exercise of quasi-judicial power by various special agencies of state government.

Our standard state judicial system, which derived its form and many of its unfortunate limitations from pioneer conditions, has been justifiably jealous of the relative success of the administrative agencies. Only within the last year or two has there been any suggestion that the "court system" could with advantage borrow from the structure and the experience of its rivals.

Newer still is the observation that our familiar tribunals exist for purposes of *administration*—of exercising "administrative powers." And this notwithstanding our constant use of the term "administration of justice." An easy way to arrive at this new conception is to start with our probate or surrogate courts which, in their essential powers and services are notably administrative. Nor does one strain the definition of the word "administer" in pointing to modern trends in penology in which criminal courts exercise powers. That equity involves administrative powers and duties has always been obvious. Finally, do not our law courts administer statutory and unwritten law? And would it not be an advantage if they should acquire a larger measure of administrative technic? This might come through a larger use of masters. In the field of minor civil and criminal jurisdiction Virginia solved the problem by enabling circuit judges to appoint and superintend the work of "trial justices." The Virginia system can challenge any administrative tribunal or agency for the highest honors in the judicial field.[1]

The existing demand for more efficient services by the conventional tribunals can never be fully satisfied without giving our judicial system unity of structure and responsible supervision.

It is conceivable that Dean Green's proposed unified court could be wrecked by unqualified, lazy, irresponsible judges. No human institution can be guaranteed for all time, not even our constitutions. While we have constitutions, however, we should not be psychopathically afraid of experimenting with internal partitions of power.

Dean Green sticks closely to his pattern of thought. Only readers totally lacking in imagination need be warned to pass him by unread.

1. The Virginia trial justice system constitutes the most significant advance in its field yet made in this country. Dean Green is justified in utilizing the principle. See description by Arthur F. Kingdon, Jour. AJS 23:6:216.

The most important readjustment which is now getting under way is the reorganization of trial courts. The trial judge is probably the most important officer of government. A well trained trial judge with adequate machinery at his disposal can do more by way of developing and maintaining orderly, inexpensive and satisfactory government than any other official. The trial court as an unrelated unit, especially in the thickly populated areas, is no longer a successful agency of government. The study of court organization results in a similar conclusion in many parts of the country, namely, that courts should be integrated and administered the same as other departments of government.—*Dean Leon Green.*

Voluntary Judicial Conference Urged

The modernizing of procedure has already gone so far as to justify confidence of reasonable success in virtually all states. A harder problem looms, that of integrating the court structure; harder because of the difficulty of amending constitutions. Because of that difficulty the JOURNAL would be justified in reminding readers in every number of the wholesome advice tendered in the recent August number (p. 38) by Judge John J. Parker, the authentic originator of the circuit judicial conference.

Realizing the need for a de facto unification Judge Parker asked Fourth Circuit judges and bar leaders to meet once a year for a full discussion of opportunities to improve their services. And so the federal circuit judicial conference, now recognized as one of the most vital elements of federal judicature. And so also a model established for the states.

Surely there can be no reasonable opposition to Judge Parker's counsel that in every state, at least once a year, the judges and bar executives should meet for serious study of their joint responsibilities. Such conferences should provide the most direct route to the long established ideal of integrated state courts; but whether they do or do not, the conferences are certain to afford great benefits.

A Practical Way to Administer Justice*

BY LEON GREEN†

"Lawyers can have what they choose. If we have efficient courts, swift and inexpensive justice, a well fed and highly appreciated profession, it will be because lawyers devote themselves to these ends."

As a lawyer and a law teacher I have three very strong professional interests: *First,* I hope it shall come to pass in our day that the thing we call justice shall be in the reach of every person in this country promptly and at a cost he can afford. *Second,* I hope that justice in the largest possible degree shall be administered through the courts. *Third,* I hope the *lawyers* shall bring these things to pass and that as a result they shall gain an economic subsistence worthy of their service.

In other words, my professional platform calls for a better distributed justice, through the courts, with lawyers playing the leading roles and profiting accordingly. With all the faith that any one can have I believe all three hopes are within the range of professional achievement. If they are not achieved it will be because we prefer to live in an unhappy professional world rather than a happy one. And may I add that I am not one to gainsay the many delights to be found in an unhappy world—especially for lawyers.

Recently there has been a great deal of distress among lawyers on account of the increase in administrative agencies. These agencies, created to deal with new problems which have arisen in our social order, have been disparaged in numerous ways. The fashion now current is to refer to them as "judge, prosecutor and executioner" rolled in one and as creatures of an "administrative absolutism." It seems to me that these and other epithets are largely unwarranted and for the most part are the reactions of those who are either frightened or

*An address delivered at a meeting of the Allen County Bar Association, Fort Wayne, Ind., April 18, 1940.

†The author is Dean of Northwestern University School of Law, Chicago.

who are trying to frighten others. Historically, these agencies would seem to be but the normal growth of the Anglo-American legal order, and while they must be perfected in their techniques they are in no sense foreign to our system of government.

It will be remembered that the original common law courts—the court of Exchequer, the court of Kings Bench, and the court of Common Pleas—were but the administrative arms of the central government set up after the conquest of William the Conqueror. Likewise the later development of the Chancery Court was the purest type of administrative agency. It required several centuries for these agencies to grow into courts in our sense of the word. In fact, it required 800 years for the English judicial system to mature into its present form inaugurated by the judicature act of the 1870s. During this period many other similar agencies were set up; some vanished from the scene while others survived and became merged into the present English court system.

Provision for the early American courts followed rather closely the pattern of the then current English nisi prius courts. The pattern has been departed from only by multiplication and addition. First came the development of separate appellate courts and then many specialized courts, such as probate courts, criminal courts, various courts of domestic relations, juvenile courts, municipal courts, and others. Whenever new problems have arisen, or an excess of business of a particular type has become burdensome to the older courts, new courts have been established and equipped procedurally to deal with the situations. The same sort of growth has taken place in the federal court system. So long as these new agencies were called courts, there was very little excitement, though it is true that ever since chancery became a rival of the common law courts there has always been vigorous opposition on the part of some lawyers against any departure from the common law court pattern. As you will recall, the opposition to chancery courts continued in this country until late within the 1800s.

The point to be emphasized in this extended development of courts and court systems is that the great problems have always concerned their *administration*—questions of personnel, jurisdiction, terms of court, forms of action and pleading, evidence, jury trial, appellate review and execution. The difficulties created by the development of the substantive law have been of no consequence at all in comparison with those of procedure. The first big problem was the development of adequate administrative machinery—a court system independent of executive power, and free enough of legislative domination to permit effective functioning. But when that separation of powers had been achieved scores of court administration problems still remained.

COURTS ARE ADMINISTRATIVE AGENCIES

Administration is a necessary incident of each of the coordinate departments of government. As neither department is supreme so the administrative processes of neither is supreme. But the judiciary as one branch of government, while not supreme, has distinct functions to perform which require processes suited to those functions alone, and it should have, and now does have, the administrative power to achieve its ends unembarrassed by the processes of the other two departments.

Allow me to make this observation which is implicit in our legal order but an observation which is seldom expressly made, namely, the judiciary or court system is itself but an administrative agency of government.

First, it is the department of government which is charged with the adjustment of justiciable affairs between private individuals; all those everyday conflicts which arise between Tom, Dick, Harry & Co. The common law courts, through the judicial process, have worked out both the law and the procedures for the settlement of these affairs. In other words, the administrative power of the courts has grown with its exercise. The legislatures have contributed something, but the courts without question have been dominant in this development. Legislation in this field is so colored by the judicial content in its ultimate effect that we look upon both substantive and procedural law of the courts as the *common law*.

Second, the judiciary is charged with the adjustment of the justiciable affairs between private individuals and the government; and *third*, under American law at least, with the adjustment of the justiciable affairs which arise between the several agencies of government. In the adjustment of disputes between

the government and individuals and between governmental agencies, the legislatures have had a much larger hand. But even in this field of public law the judicial process has played a controlling part and has brought over many of the principles both of substantive and procedural private law to the solution of public law problems. The fact that the court's methods of administration differ from the methods of executive and legislative methods of administration do not make them any the less administrative. They merely constitute the methods of judicial administration. As lawyers we are jealous of the methods of judicial administration and resent having other methods substituted for them.

It is probably fair to say that while courts have been successful in ultimately developing and refining processes suited to the ordinary run of problems, these processes have not on the whole been well administered. *First*, the courts have been slow to make themselves responsive to new problems; *second*, they have so refined their procedures in the attempt to do an exact justice that great injustices have been done as the result of delays, excessive costs, and the development of subtleties and intricacies which have played into the hands of the unusually skilful lawyer on the one hand and the unethical lawyer on the other. Ideals of justice have tended to make courts dissatisfied with a fair approximation of justice and to make them strive for an unattainable goal of perfection through legal processes. Perhaps due more to the stubborn insistence and resourcefulness of litigating counsel than otherwise, courts have permitted their functions to become more and more obscured by ever expanding, lengthening, expensive, delaying methods of performing those functions.

As the result of this lack of administrative statesmanship it has frequently been necessary to create new agencies to supplement—sometimes to avoid—the processes of the courts and even more frequently to press for broad reforms of court procedures. Judicial reforms have been coming along in a constant procession now for nearly a hundred years. Every step in the long process of trial and review has been overhauled; some of them several times. The extensive revisions of the past few years in which everybody has had a hand, amply demonstrate how administratively inefficient the courts had become.

We perhaps should not be disturbed about the failure of the courts to respond promptly to new social problems. Such responses should doubtless come first from the legislatures. It is true that we have a few great instances of courts doing extraordinary creative things, as for example the Chancery Court's response to the need for protecting married women, and the development of such protective means as are found in the law of trusts generally. But by and large it would seem that most new problems require not only new agencies but new processes adapted to their needs. After the new processes have passed through the experimental stage and the problems reduced to a justiciable form, it is time enough for them to be taken over by the courts. Until that time the legislative experiments should continue and the courts remain unhampered so that they may perform efficiently the great burden of normal work they have to do. No one who recalls the crowded calendars caused by the "noble experiment" would desire otherwise. Any governmental problem that can be successfully handled outside the courts should not be thrust upon them. Their methods at best are comparatively delicately attuned and can be easily overloaded and disrupted. It is as essential that they be protected from what they cannot do as that we insist they be given what they can do best.

LEGISLATIVE AID ESSENTIAL

No one would contend that we should expect the courts to take over and handle, of their own motion or even under legislative direction, the problems which have been committed to the Interstate Commerce Commission, the Federal Trade Commission, the Securities and Exchange Commission, the National Labor Relations Board, The Federal Communications Commissions, The State Public Service Commissions, and to numerous other boards and commissions with somewhat comparable problems. These matters have so little in common with the general run of courthouse cases that they would not respond to normal court procedures. The most we can expect of the courts in these new ventures in government is superintendence to the extent of seeing that the various processes authorized by the legislatures, and devised by the agencies themselves under legislative direc-

tion, are not violative of our basic principles of government.

In this connection it would seem equally vain to expect that the procedures of these agencies could be perfected over night, or that any attempt to crystallize their procedures quickly could be successful. Knowing as we do how slowly our court procedures have been developed, it is not rational to expect that the problems assigned to these agencies should be brought at once under wholly acceptable processes. These agencies may be the beginnings of courts, but they are not yet courts, and should not be expected to be cast in the image of courts. On the other hand, they should be permitted to some extent at least, through trial and error, and without too much interference, to find out how best to deal with the problems they have been set up to solve before their procedures become crystallized. If I may add a personal observation, it seems that some of the agencies, when all the circumstances are considered, have done an amazingly good job—a much better job than the courts themselves are doing where the difficulties are somewhat comparable as, for example, in our big cities.

A little while ago I stated that I thought the courts had been weak on administration. Let us examine that statement further. If the courts have not been well administered it has been due to no lack of administrative power, incidental and implied though it was. On the other hand, it is probably due to the fact that the courts for a long time thought that administration—even court administration—was not a part of their functions. For a long time they seemed to think that their administration must come from the outside. They have done only a minimum of administration, and even that has been done timidly. No doubt they have felt embarrassed and handicapped and even, at times, abused. So has the profession at large generally felt for them. But lately both the courts and the profession are thinking differently. Judges are discovering power where their predecessors thought there was none. They have been moving under their own power where earlier courts refused to budge; their administrative processes have been expanding rapidly. The rule making power, for example, so long unused, is now generally conceded to be essential. Bar admission and professional discipline have been taken under judicial control almost everywhere, and some courts have provided organization structure for their bars. Numerous legislative restraints have been pushed aside. At this time, in judicial conference and councils, nearly all the problems of judicial administration are under consideration. And I may add that all this has been done with the profession's approval, and sometimes upon its insistence.

STRONG MEDICINE NEEDED

These steps are excellent. They are producing good results. While they do not strike at the root of the evil, they must inevitably lead us to realize what the basic trouble is and to grapple with it. Perhaps we are about where the English courts were a century ago—with more courts, with more different sorts of judges, and with more procedure than we know what to do. If that is true (while I am no advocate of everything the English did), the way out seems the way they took. But I think we must go much further than they did. For one thing, we have so much more judicial business to handle than they had. Also our governmental structure and organization is so much more complex. In my humble opinion, nothing less than a complete reorganization of all our courts under competent and vigorous administrative control will give us what we must have, namely, justice done swiftly, efficiently, and at a cost within the reach of every citizen. In current vernacular it would seem that the administrative agencies "have something"—something the courts should have had long ago—something they must have to survive—something the courts can use to better advantage perhaps than can the administrative agencies themselves. Thus it may be, if we can hold our tempers long enough to let our judgment get control, that we can take over this "something," utilize it in behalf of our court processes, and perhaps make unnecessary some of the agencies we do not like.

Let us suggest some of the things that might be done. I wonder if we could not *eliminate entirely* the difficulties which grow out of such matters as terms of court, jurisdiction, process, and pleading? This is a big order, but if it could be done a lot of slack would be taken up. Suppose we went further and *removed* most of the unnecessary and time-consuming formalities incident to endless motions, making proof, instructing juries? And of equal importance

discard practically all of the enormous procedure involved in appellate review? Why be satisfied with the idea of reducing the average time of taking a case through the courts from three years to one year? Why not make it possible to exhaust the entire court process within six months, and why not make the period covered by average litigation not more than two or three months? This for the complicated cases—for the simple cases why not reduce the time to days or weeks at most? Why not reduce periods of limitation, provide for installment payment of judgments, arbitration where the parties are willing, and many other such aids to administration?

PUBLIC AND BAR INTERESTS IDENTICAL

It is sometimes argued that lawyers consider they have a proprietary right in all the useless paraphernalia which has grown up around court procedure and that to eliminate it and permit the courts to function promptly would destroy the profession. I do not believe that lawyers think that way, nor do I think they feel that better business methods for the courts would destroy their profession. On the other hand, as far as I have been able to observe, lawyers are the severest critics of the methods the courts employ, many of them fear they are being destroyed by the courts' methods of doing business, and would welcome a system which would expedite their cases, reduce their expenses, give them the opportunity to render more and better service to their clients, bring them more clients, and increase their incomes.

I dare suggest that if we as practical minded American people, were given the task of developing a court system that would do the work of today promptly, efficiently, and inexpensively, we should develop a system as superior to the present one as the automobile is superior to the farm wagon or as the telephone is to the means of communication of a century ago. But it is very difficult to escape the pressures of history. Individuals here and there may do so, but rarely can an institution or a group do so without a terrific struggle. We quickly become committed to what we are familiar with. Both our thoughts and our language die slowly. Our responses to new demands are patterned in the old forms. We are not free to set up a new system of justice as we were to perfect the automobile and telephone. And should some constitutional amendment direct the setting up of a new system, the tendency would be strong to recreate it in the image of the system we now have. We cannot easily escape our history, learning, and habits as lawyers. That does not mean we cannot allow our history to have a normal growth nor does it mean that we cannot extend our learning and modify our habits. In fact the urge to change is just a bit stronger than the urge to stay put. And that I am not talking through my hat in suggesting far-reaching changes in court administration is indicated by what is happening in Virginia. The article by Mr. Arthur Kingdon in the JOURNAL OF THE AMERICAN JUDICATURE SOCIETY (23:6:216. April, 1940.) describes what is being done in the lower levels of the Virginia court system. If it can be done for the thousands of small cases it can be done with even greater ease for the hundreds of big cases. Mr. Kingdon's article has given me great reassurance in venturing my suggestions here tonight.

You are perhaps curious to hear my specific suggestions for accomplishing the ends proposed. Please do not expect anything radical, for I also as a lawyer am conditioned by the very same history, learning, and habits as condition your own thinking. Let me make the suggestions briefly and in broad outline and with just enough detail to make the outlines clear. The suggestions require extended elaboration, but you will have to do that for yourselves.

Let us suppose there should be authorized by constitutional authority a single court for a state with all the necessary power for its proper administration, for example, *The Court of Indiana*, with say twenty-one judges including a chief justice, elected at large, and with staggered terms. This court under the administration of the chief justice would try all the important cases in Indiana. It would have the power to make all procedural rules of every character. It would have the power to appoint an administrative judge in every county and through him set up appropriate dockets, office records and practices, employ secretarial assistants, and *appoint such assistant judges as might be necessary* to do all the minor court business of the county, and to prepare and set for hearing all the important cases for the one

or more judges assigned to try them.[1] All court business in the county would go through the same office, but of course there would be as many divisions in the office as were required. Cases would be tried at such places in the county as were convenient to the parties, witnesses and lawyers. In important cases informal pretrial procedures would reduce the points of litigation to the minimum and thereby result in a great many settlements before trial. Appeals would be heard in all cases on motion for new trial with an additional one or two judges sitting with the trial judge; very difficult cases could be reserved for a reviewing division of the court sitting, say, at Indianapolis. Also, certiorari would be available in such cases as the reviewing division thought worthy of further consideration. Opinions would be written only in the cases reaching the reviewing division, and the number should be very few.

Paper work, except formal entries, would be reduced to a minimum. Pleadings, probably oral in a great many cases, would assume even in very important cases, a mere statement of the claim, such for example, as John Jones sues Bill Smith for personal injuries and property damages resulting from an automobile collision which occurred on a certain day at a certain place. In novel and complicated cases the court might require fuller statements. Process would be served in person, by mail, telegraph or even telephone, as the situation might demand; witnesses subpoenaed likewise. The issues would be formulated at the pretrial hearing if such were desired and would be simple; Jones claims Smith was negligent; Smith claims he was not negligent but if so, Jones was contributorily negligent, etc. Jones claims the following items of damages.

On the trial the emphasis would be placed on the proof. Pretrial procedure would require a statement of the proof to be offered by each party. Rules of court would dispense with many rules of evidence that obstruct getting at the facts. All important proceedings might be taken down either by shorthand or voice-recording machines. The jury would be asked to answer only controlling questions on the issues made: Was Smith negligent in handling his automobile; was Jones contributorily negligent in crossing in front of the automobile, and so on; could Smith have avoided the injury after he discovered Jones' situation? Argument of counsel would be restricted to the issues. Judgment would be given on the answers.

Counsel would of course make his objections and reserve his exceptions. Such of these as seemed pertinent would be argued orally on motion for new trial and briefs could be submitted on such points as the court desired. If reserved for the reviewing division, or if certiorari should be granted the points of conflict could be formally briefed and supported by such parts of the record as were pertinent.

SAVING TIME IS ESSENTIAL

Every device of transportation and communication; every device of office equipment, records, and so forth, as are now used in modern business and which might be found adaptable to the business of the court—would be employed to save time and cut down expense, and to make the work of the court better understood by the citizens of the state. The last is a byproduct not to be overlooked in a democratic society.

In brief, the idea would be to provide a very flexible court system under the supervision and direction of a single body with a chief administrative officer charged with the duty of seeing that the system properly functioned. The court would be free to change the procedures or create new procedures as experience directed. Errors would be made, of course. But a single court responsible for the administration of justice throughout the state and on the job day in and day out, with the power to correct its errors, increase or reduce its staff, improve its methods, would in the course of a few years make the courthouse a symbol of what every citizen wants it to be and what every citizen now knows it is not.

The details of a judicial organization set up along the lines described would offer many difficulties. But they can be met if we are not insistent on perfection at the start. My own formula for details is to get the machinery set up structurally and then let those in charge supply the details as experience dictates. In part the details are matters for those who have

1. Readers interested in practical modern methods of transacting business of the courts will want to read also the plan of organizing the trial bench of Los Angeles, suggested by one of its judges, William J. Palmer. L. A. Bar Assoc. Bulletin, Mar. 15, 1934. Comment on Judge Palmer"s proposal was published in this JOURNAL, 18:2:41, August, 1934.

in hand the administration of the system. It is enough for us as citizens and lawyers that we can stand on the side lines and criticize and protest until the details are worked out satisfactorily. That, too, is a function the importance of which we must never overlook in a democratic society and never penalize. I feel certain that we could trust a court made up of good lawyers selected as the voters may decide, shouldered with a responsibility which could not be shifted, and with the power to do what seemed necessary to dispose of the judicial business of the state satisfactorily, to work out a system of court administration acceptable to all of us.

If we should ever develop such a means for handling our current problems, then as new problems arose it would probably not be so very difficult to devise ways and means for them to be handled by judicial administration instead of being subjected to the trial and error methods involved in the creation of entirely new machinery. Lawyers can have what they choose. If we shall have efficient courts, swift and inexpensive justice, a well fed and highly appreciated profession, it will be because the lawyers devote themselves to these ends.

We are not going to wake up some morning and find them as a gift from heaven. On the other hand if we continue to drift with the wind with our most important business being done by administrative agencies, with lawyers a sort of social appendix, every time business gets a pain we shall be given the knife. The lawyer's place is as the servant of the social order. When he attempts to become master of the order in his own right he will go the way of all servants who forget their place.

Sure Recipe for Local Bar Success*

EMIL E. STORKAN

IS YOUR local bar association a live one, or is it failing because of dissension, dissatisfaction and lack of interest? If it is active, this is perhaps because its executives are consciously or unconsciously following certain fundamentals that go into the making of a live association. If it is inactive, or failing to function properly, this may be because its executives are not observing these fundamentals. The faults are generally faults of administration. The blame lies at the door of management in ignoring them. The blame also lies on the membership in failing to elect executives who do not apply, or who are ignorant of fundamental principles.

Why does an association succeed under one administration and fail under another? It is because the first administration follows the rules of the game. The second administration would have succeded had it had this knowledge and followed it.

In every walk of life success or failure depends somewhat upon whether essential elements are followed or ignored. Fraternal societies, patriotic organizations and dinner clubs have flourished and expanded, due largely to the adoption and use of certain rules of procedure followed in their management. When these rules have been adhered to, the organization succeeded; when they have been omitted or ignored, the organization died, or merely existed.

Local bar associations have not kept abreast of the times. We have been attempting to administer them without any system, method or plan, and with little or no knowledge of the fundamentals that must be followed in making them live and active. We have not realized that success or failure depends upon whether or not a definite program of procedure is adopted and used. Is it any wonder then that so few bar associations function as they should function?

Leadership is not made overnight. It must be trained. The old saying that a squash can

*Address delivered at the meeting of Michigan local bar association presidents held January 20, 1940, at the Hotel Olds, Lansing.

†President of Calhoun County Bar Assoc.; Chairman of State Bar Com. on Local Bar Assoc.; Chairman of Com. on Local Bar Assoc. of ABA Section of Bar Organization Activities.

be made in six weeks, but it takes a long time to make an oak tree, applies to the training of men to be leaders. We should train our executives by requiring them to go through the "chairs." Electing to office men who have gone through the chairs minimizes the chances of securing poor leadership. The start is made by placing a man upon a committee. Then making him chairman, then vice-president, and ultimately president. He is then a trained man. He has demonstrated that he has the welfare of the association at heart, and is willing to put forth his best efforts towards making it a success.

The following requirements may be considered fundamental.

The president should be an active member of the American Bar Association. He should attend its national and regional annual meetings, and report his observations to his local association.

He should attend the annual state convention of the State Bar. He should cooperate with the chairman of the local bar association committee of the State Bar.

The president should know the duties of a presiding officer. He should not make it a one-man Bar Association, nor make it a one-man show, nor monopolize the program.

The president should be a member ex officio of the executive committee for one year following his term of office.

A secretary-treasurer should be elected who has qualifications which are likely to result in long tenure of office.

His succession in office will give him a general knowledge of the constitution and by-laws of the American Bar Association, the state bar, and his local bar association. This will enable him to keep the officers and members of the executive committee informed on the objectives, purposes and activities of these associations. The practice of electing a young lawyer just out of college as secretary should be discontinued.

The secretary should be given a membership in the American Bar Association.

The executive committee should meet at least once a month. Monthly meetings are the life of an association. It is essential that those who have the management of the local bar association in hand should occasionally meet and talk over the affairs of the association. The executive committee should be composed of at least eight members, consisting of the president, vice-president, secretary-treasurer, the past president, and four members, two to be elected each year to hold office for two years. They should not be eligible for reelection as members of the executive committee. Limiting their terms will bring new blood to the executive committee each year.

The place of meeting should be the best available and easily accessible. Have good meals. The president or program committee should assist the management in planning the meals, to avoid objections from the members.

Monthly meetings should be held.

Meetings should commence at 6:00 or 6:30 o'clock and end at 9:00 o'clock. At least nine monthly meetings should be held from September to May, inclusive.

Programs should be printed or mimeographed and mailed to members at least one week prior to each meeting.

Programs should be planned at least two months in advance. This prevents waiting until the last minute. Only the best available speakers should be invited.

Programs should be diversified. Members prefer speakers who live outside the local community. The meetings should be of a serious nature. The president is responsible for the success of the meeting. He gets the credit or blame for a program. He shuld take an active part in the selection of speakers. The president or vice-president should be program chairman. A different member of the bar should preside as chairman of each program.

A flat fee should be charged per year, which includes the cost of the dinners. When a man pays for his dinner in advance, he will be more likely to attend a meeting. Experience has proven this to be true. Where eight or nine meetings are held during the year, the dues may range from $8.00 to $10.00, payable one-half at the beginning, and the balance at the middle of the term. By adopting a flat annual fee which includes the dinners, there will be a balance in the association's treasury, because there will always be a few absentees.

At least once a year the local bar association should meet with some other bar association, or with a group of associations, at a district meeting. Have your secretary exchange pro-

grams with the secretaries of other bar associations so that each bar association will be informed of what others are doing.

Officers and members of the Executive Committee should be elected on merit. To insure this selection, a primary should be held once a year, prior to the annual election to determine the sentiment of the members. This overcomes the complaint that a certain group controls the association. Politics should be eliminated.

Have a constitution and by-laws which will incorporate most of the fundamentals. Constitution and By-Laws may be secured by writing to the Executive Secretary of the State Bar of Michigan, Lansing, Michigan.

Success requires good leadership. Leadership is not a static thing. It does not say, "Here I am, use me." Leadership cries for action. It says, "There is something to be done; I am going to do it." Leadership is not finding out which way the crowd is going and then running ahead of it. It is thinking to make others think; feeling to make others feel; it is using a fire to light as well as to burn, that makes leadership. It is kindling a sympathy and trust that the members will eagerly follow. Let us encourage and promote this leadership.

Pretrial Aids Master's Hearings

Instances of the use of pretrial conferences under novel conditions appear frequently. For a number of years this procedure has been employed by Frank T. Boesel, a special master of the circuit court of appeals of the seventh circuit, and largly in the hearing of claims in connection with the reorganization proceedings of the Chicago and Northwestern Railway Company.

The master was confronted by claims to the number of 1031, involving millions of dollars. He relied upon federal equity rule 62 which conferred full authority to "direct the mode in which the matters requiring evidence shall be proved before him." Master Boesel anticipated the adoption of federal rules looking to the expeditious hearing of cases, and particularly the pretrial rule.

The consequence of this practical mode of procedure has been a marked saving of time, to the advantage of all concerned. In his home city of Milwaukee Mr. Boesel has been a conspicuous practitioner and for many years also a member of the faculty of the law school of the University of Wisconsin.

What Our Courts Most Need

Addressing a session of the New Jersey State Bar Association recently Dr. Pound made a forceful plea for judicial unification and economy. While seven judges are sufficient on the New York court of appeals, New Jersey employs from eleven to sixteen for that function, "a sheer waste of judicial power."

"With the enormous demands on government revenues today we simply can't justify waste of judicial power. We are just beginning to develop something in the way of administrative headship. There ought to be responsible judicial direction so that the public and the profession can hold somebody responsible for the efficient operation of the judicial organization.

"Our organization of courts is after the seventeenth century English model, which was hopelessly archaic at that time. The English made over their court organization in 1873, and they did so by unifying their courts. We, on the contrary, have gone on multiplying courts. What we need is a unification of the court system."

And unification implied, the Dean said, a single judicial department with responsible superintendence.

LAWYERS are put in a very difficult position. They are compelled to use facilities which they do not approve, which do not satisfy the public, which arouse public distrust, and which are driving the public away from the very service the profession is offering.—*Edson R. Sunderland.*

Improvement of Appellate Procedure*

EDSON R. SUNDERLAND†

"THE result of the English system is to make the calamity of a new trial almost unknown. The English reports for 1924 show only two cases sent back for new trial in the King's Bench Division during the whole year. . . New trials are a total economic loss and their frequency in the United States is the most convincing proof of the utter inadequacy of our trial procedure."—*E. R. S.*

I

ONE of the most extensive fields of legal procedure is that which deals with appellate review. No part of the law is more deeply incrusted with the relics of ancient customs and institutions. None has been more completely removed from the influence of lay opinion, and consequently none has been more highly technical. It is a field which abounds in rationalized explanations for unnecessary processes and useless restrictions, and it is possibly for that reason that appellate practice is in so chaotic a condition in the United States. The subject of Appeal and Error occupies more space in *Corpus Juris* than any other except Corporations.

In examining the problems of appellate procedure, one must not make the mistake of assuming that they occupy a detached position in the field of judicial administration. Everything done in a court of appeal is the result of something done in the court below. By eliminating opportunities for errors in the trial of cases, we correspondingly diminish the occasion for resort to appellate review. Very little consideration has been given to the economic and political value of better trial procedure and more capable trial judges as a specific remedy for the enormous expansion and complexity of business in appellate courts.

If the efficiency of the trial court were improved, in both the inferior and superior grades, litigants might be more willing to accept the decision and forego any appeal. The direct cost of appeals to the parties and to the state and the indirect cost to society and industry of the delays resulting therefrom represent the saving ideally possible if trial courts could function to the entire satisfaction of litigants. It is worthy of note that England, whose judicial sysem works much better than ours, spares no pains to obtain the very highest grade of judges in her trial courts. English county court judges have a jurisdiction practically equivalent to our justices of the peace. They must be barristers of at least seven years standing, are appointed for life by the Lord Chancellor, are paid a salary of £2,000 a year, and are entitled to an annual disability pension up to £1,333.[1] The judges of the King's Bench and Chancery Divisions have a jurisdiction equivalent to our circuit or district courts. They must be barristers of at least ten years standing, are appointed for life, are paid a salary of £5,000, and are entitled to a pension after fifteen years of service or upon disability of £3,000 a year. The Lord Chief Justice is not primarily an appellate judge, but a trial court judge; his salary is £8,000, and his pension is £4,000. The judges of the Court of Appeal receive no higher salaries than the judges of the trial courts.[2] The English instinct for judicial administration has always recognized the trial, rather than the appeal, as the primary field of court operation. With trial judges fully equal in ability and professional standing to the judges of appeal, there is far less inclination to question their deci-

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*The substance of an address delivered before the annual meeting of the Iowa State Bar Association, June 8, 1940. For permission to publish thanks are due Professor Sunderland and the Iowa Law Review, in which first publication was had in the November, 1940, number (26:1). Part III which deals with the "mechanical system in appellate review" will appear in the next (December) number of the JOURNAL.

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1. County Courts Act, 1934, 24 & 25 Geo. V, c. 53, §§ 8, 9.

2. Jackson, The Machinery of Justice in England (1940) 206, 322.

sions. Correcting errors on review is a clumsy and unsatisfactory substitute for trying the case properly in the first place. Prophylactic methods ought to be considered standard in law as well as in medicine and business, and the resort to therapeutic treatment should be necessary only in unusual cases. The fundamental problem of appeals is to avoid appeals—to make the trial so efficient that an appeal will seldom be asked for.

On the procedural and mechanical side, the greatest source of trouble in the trial court, which directly produces its counterpart of trouble in proceedings for review, is the failure of the pleadings to constitute a satisfactory basis for preparation for trial. They have always been inadequate. This has been due to the principle of party-presentation, under which the parties themselves, by *ex parte* statements, framed the issues and laid them before the courts for decision. The judges were in no way concerned with what the parties brought forward. A plaintiff's case might have no substantial basis whatever. A defense might be purely fictitious. Whatever the parties asserted or denied was taken at its face value as a basis for the trial. The judges never sought to protect themselves or the parties from the useless trial of issues based upon allegations or denials which had no colorable existence in fact. It was their business to try the cases as the parties presented them; if a case lacked substance, the trial would disclose it.[3]

But even though the pleadings should present only bona fide issues, which were actually to be tried, the allegations and denials of the pleadings would still be inadequate as a basis for preparation for trial, because they do not indicate the nature of the evidence which is to be offered. One may understand the nature and extent of an adversary's claims without knowing how they will be supported or what kind of evidence should be obtained to oppose them. The allegations and denials in the pleadings deal with facts of a highly generalized type, not with matters of evidence. They indicate the results which the pleader expects to establish by his proof, not the nature of that proof. If evidence of one kind is to be offered, it can be met by certain counter evidence; but if evidence of a different kind is to be introduced in support of the same allegations, counter evidence of a wholly different kind must be employed. For example, the allegation of a promise may be proved in a number of different ways—by letters, by telegrams, by oral conversations, by the direct act of the party or by the authorized act of any one of a number of authorized agents, or by the act of an unauthorized agent subsequently ratified. But the defendant can form no idea from the pleadings which of these varieties of evidence will be used, and consequently he will be at a loss to know with what evidence he should be prepared to meet it.[4]

It is obvious, therefore, that the indispensable requirement for adequate preparation for trial is a suitable means for pretrial discovery of the evidence that one's adversary will be able to produce, for the double purpose of determining whether his allegations and denials will be supported at all, and if so, by what kind of evidence. The new federal rules present an imposing exhibit of a powerful and flexible system of discovery before trial designed to give to the proceedings in the trial court a directness, accuracy, and effectiveness which will vastly diminish the occasions for resort to appellate review. Under this system a party may without any court order subject any person to a pretrial examination to discover any matters within his knowledge which are relevant to the controversy, or to discover the location or identity of any other persons who might be useful witnesses as to any relevant matters, or, on order of the court, may compel any party to produce documents or tangible things for inspection.[5]

But the rules go further than that. The judge, as the representative of the public, is also interested in exposing false issues, eliminating irrelevant and uncontroverted matters, and identifying the exact points of dispute, in order that the parties, when they come to trial, will know exactly what they are to prove and how they are to prove it, will have their evidence ready, and will neither waste time nor confuse the case with inconsequential things. This purpose is accomplished by a pretrial hearing, called at the instance of the trial judge,

3. Pollock, The Expansion of the Common Law (1904) 33, 34; Stephen, Principles of Pleading in Civil Actions (Tyler's ed. 1872) 380.

4. Sunderland, Scope and Method of Discovery Before Trial (1933) 42 Yale L. J. 863.

5. Fed. Rules Civ. Proc. (1938) Rules 26-37.

under general rules or by special order, consisting of an informal conference with counsel regarding simplification of the issues, amendments of the claims or defenses, admissions to avoid unnecessary proof, limitations upon the number of expert witnesses, the advisability of preliminary references, and any other matters which may aid in the disposition of the case.[6]

Even that is not all. To prevent futile maneuvers in the trial courts and to forestall the building up of records upon which expensive and time-consuming appeals may be based, the new federal rules provide for rendering summary judgments when it appears that there is no substantial issue of fact to be tried. The method is very simple and introduces an additional instrument of discovery in the form of affidavits. If either party believes that he is entitled to a judgment as a matter of law in any kind of case, he may move for such judgment on the ground that the pleadings together with the discovery instruments on file, consisting of depositions, admissions, answers to interrogatories, and such affidavits as he himself may present in support of his motion, show that he is entitled thereto. The adverse party may file such affidavits as he may desire in opposition to the motion. Upon the hearing, if it appears from an examination of the files that, except as to the amount of damages, there is no genuine issue as to any material fact, the judgment shall forthwith be rendered.[7]

By the elimination of cases which are settled as the result of pretrial discovery and by the simplification of the issues in those cases which are eventually set for trial, the number of cases appealed, the variety of errors assigned, and the size of the records prepared cannot fail to be greatly reduced. So much for the prophylactic treatment of appellate problems.

II

COMMON LAW REVIEW INADEQUATE

When we look at the remedies offered by our system of appeals, we are immediately struck by the survival of one of the most irrational features of the ancient common law—namely, the proceeding in error. The Iowa code, for example, provides that upon appeal in ordinary actions the court shall hear and try the case only on the legal errors presented,[8] while in equitable actions the supreme court shall try the case anew.[9]

There was nothing known to the common law which was, or could properly be called, a true appeal from one court to another, and this was so in England until the Judicature Act of 1873.[10] All questions of fact were decided by juries, and a review of the facts could be had by what was called the attaint. This was the common-law predecessor of the new trial, but it took place before a superior jury of twenty-four who reviewed the action of the twelve. It was primarily a proceeding against the jury rather than against the verdict. The attainted jury was punished by imprisonment and fined for its false verdict, although the false verdict was at the same time, and as a useful incident, replaced by the true verdict of the higher jury.[11]

Questions of law, on the other hand, were decided by the judges, and a proceeding very much like the attaint was developed to reach false judgments. In the 1200's complaints against judgments took the form of semi-criminal proceedings against the judges, and Holdsworth tells us that even to the present day the writ of error is deemed to commence a new suit for no better reason than because six hundred years ago it really was a new proceeding directed against the judge and was based upon a new cause of action arising out of the wrongful act committed by him in rendering his false judgment.[12] To this day, also, we employ formal assignments of error because six hundred years ago the judge was held to be entitled to know what were the charges against him, and the assignments of error are still regarded in many of our states as the appellant's pleading in the court of errors, just as they were regarded six hundred years ago.[13]

The amazing thing about the common-law proceeding in error was that it did not operate

6. Id. Rule 16. Sunderland, Discovery Before Trial Under the New Federal Rules (1939) 15 Tenn. L. Rev. 737, 753.
7. Fed. Rules Civ. Proc. (1938) Rule 56; Third Annual Report of the Judicial Council of the State of New York (1937) 30.
8. Iowa Code (1939) § 11431.
9. Iowa Code (1939) § 11433.
10. 2 Pollock and Maitland, History of English Law (2d ed. 1899) 664; 1 Holdsworth, History of English Law (3d ed. 1927) 214.
11. Zane, The Attaint (1916) 15 Mich. L. Rev. 1, 127.
12. Holdsworth, op. cit. supra note 10, at 215.
13. Sunderland, The Scope of Judical Review (1929) 27 Mich. L. Rev. 416.

as a review of the merits of the judgment. The question never arose as to whether the judgment was just or unjust, nor did the proceeding ever involve an inquiry as to what the true judgment ought to be. The sole question was, Did the judge commit an error? Such error might be great or small, its consequences might be serious or trifling, but an error was an error and the judgment must fall. The persistence with which the scope of judicial review in common-law actions was confined to the identification of errors was due to the institution of trial by jury. Errors brought up by bills of exception did not immediately control the judgment, but only affected the minds of the jury. The extent and character of that influence could not, however, be shown to the reviewing court. They could tell if an error had been made in admitting or excluding evidence or in any other matter involved in the trial before the jury, but they could not be sure what effect it may have had upon the verdict. In such a situation there was nothing to do but send the case back for a new trial, so that another verdict could be obtained free from the error which had vitiated the first one. The remand of cases for new trials was therefore a necessary incident in the use of juries. As long as the jury had the exclusive right to weigh the evidence and find the facts, no error which was related in any material respect to either of those functions could be cured in any other way. The judges of the higher court could not undertake to adjust the verdict so as to eliminate the error, without depriving the parties of their right to trial by jury.

Continental Europe had had a very different experience from that of England. There, both law and fact were determined by the same persons, and the theory of a divided tribunal, one part to try the facts and the other to declare the law, had never become established. Under such a system there was no serious obstacle to a full review of a judgment by other judges, who could be as free to reconsider the facts as they were to pass on the law. This enabled the appellate tribunal to dispose of the whole controversy and to render the judgment which ought to have been rendered, and there was no occasion whatever for ignoring questions of fact or for sending back cases for new trials.[14]

The Continental notion of a unified tribunal, capable of dealing at the same time with the law and the facts, was adopted in England in the courts of chancery, so that in reviewing equity cases there was no need for resorting to the clumsy and ineffective procedure in error. If the upper court had the power to determine the merits of the case, it became less important to know whether an error had been committed than to know how it could be rectified. In a proceeding in error the entire aim of the review was to affirm or deny the existence of the error; in a true appeal that problem became merely preliminary to the really basic question of what the right decree should be. The appeal in equity, however, fell short of being a true rehearing, for new questions could not be considered. This was doubtless due to the tenacious influence of the concept of a proceeding in error, which contemplated as a sole function of an appellate court the review of matters already passed upon below.[15]

There were thus two distinct restrictions on the scope of review, one excluding the presentation of new evidence or of new points not raised below, which applied both to appeals in equity and to proceedings in error at law; the other prohibiting the review of facts, which applied only to proceedings in error. As far as the rules of practice, both at law and in equity, excluded new evidence or the raising of new points in the appellate court, this was a mere survival of the ancient common-law theory of an accusation against the judge. It was an inherited tradition and nothing more. It was often defended on the ground that it would be unfair to the trial judge to reverse his judgment on a point which had never been brought to his attention. This was based on the medieval theory that the judge was interested in the review as the real defendant in the accusation of error. It entirely overlooked the immensely greater interest which the appellant had in obtaining a correct judgment, and it ignored the interest of the state in the just and effective operation of its courts. The rule was often defended on the ground that it would be unfair to the appellee to raise new points against him in the appellate court, but this was obviously an excuse and not a reason, for the restriction was administered as an inflexible rule of juris-

14. Engelmann, History of Continental Procedure (Millar's trans. 1927) 369; Buckland, The Main Institutions of Roman Private Law (1931) 393.

15. 2 Daniell Chancery Practice (4th ed. 1871) 1459.

diction and not as a rule of convenience subject to special circumstances.

As far, on the other hand, as the rules of practice in law cases prohibited the review of matters of fact and prevented the adjustment of the judgment on account of errors which might have affected the opinions of the jury, they rested, not on traditional practice merely, but upon the institution of the civil jury. When waiver of juries in common-law actions was authorized in England by statute in 1854,[16] the way should have been open for the review of facts in cases tried without a jury, but so insidious was the power of inherited tradition that the very act which authorized the waiver provided that the finding of the judge in an action at law unlike his finding in an action in equity, should have the same effect as the verdict of a jury, thus destroying the possibility of a true appeal.

The Judicature Act finally emancipated the English courts from this irrational limitation upon the effectiveness of an appeal in law actions, and English appellate courts now review questions of fact as freely in law actions where no jury is employed as in suits in equity, and they show no hesitancy in considering new questions or even of admitting new evidence, as long as the parties are protected from prejudice and the ends of justice are served.[17]

The United States unfortunately inherited the proceeding in error as it came down from the Middle Ages, with its dual restriction against reviewing facts and raising new points on appeal, and these ancient doctrines still persist in many of our states.

The *reductio ad absurdam* of the doctrine that a reviewing court has no power to consider anything not passed upon below is found in the case of *State v. Garcia*.[18] In that case one Francisco Garcia and his brother were indicted for murder, and both were found guilty of manslaughter. In its opinion on review, the Supreme Court of New Mexico says:

"A curious fact appears in this case. Francisco Garcia, one of the defendants, became engaged in an altercation with the deceased, whereupon deceased shot Garcia and he fell to the floor, and remained there, unconscious, during the whole of the remainder of the difficulty. Cipriano Garcia, his brother, was at the time at the back of the saloon where the difficulty occurred, and took no part in the same up to that time. Upon hearing the shot and seeing his brother fall to the floor, he rushed to his rescue, encountered the deceased and killed him. No proof of concerted action on the part of the brother is shown. It thus appears that it was physically impossible for Francisco Garcia to be guilty of any crime in this connection, and he was entitled to an instruction to the jury to acquit him. Had the matter been called to the attention of the court before instructing the jury, no doubt he would have so directed them. But counsel sat quiet. Nor did counsel call the attention of the court to this proposition in the motion for a new trial. Under such circumstances, no relief can be granted here. No question is here for decision, the court below never having decided the point. . . The remedy of the defendant, Francisco, is an application to the governor for pardon. . . The judgment of the lower court is affirmed, and it is so ordered."[19]

Now, why should the highest court in the state be unable to protect a defendant from punishment when the record before that court shows conclusively, as the court itself admits, that it was physically impossible for him to be guilty of any crime whatever? Because we are dealing with the proceeding in error. Six hundred years ago this proceeding was an accusation against the judge, and the judge could not be accused of wrong doing unless he committed an error, and he could not have committed an error unless he made a ruling. Hence, there can be no relief from an unjust judgment, unless the injustice of that judgment was due to the erroneous ruling of the judge. If a ruling was not obtained, there is nothing to present to the court of error; and no matter what outrage may have been committed, the judgment must stand.

This narrow conception of the function of a court of review in an action at law has frequently been held to have the compulsory sanction of those constitutions which grant only appellate power to their highest courts. It is said that such power can be exercised only as to matters which have already been passed upon, and if new points were to be considered, that would be the exercise of original jurisdiction. But the argument begs the question. What, it may be asked, is being reviewed? The judgment or the rulings which became merged

16. 17 & 18 Vict., c. 125, § 1 (1854).
17. The Annual Practice (1940) Rules of the Supreme Court, Order 58.
18. 19 N. M. 414, 143 Pac. 1012 (1914).
19. Id. at 418, 143 Pac. at 1013. A rehearing was subsequently granted.

in it? Obviously it is the judgment with which the appellant is dissatisfied, and the correctness of that judgment is equally under review whether new points or old points are being considered. The argument confuses appellate power with the manner of its exercise and would place upon modern courts a constitutional restriction against using any data for testing the justice of a judgment which was not available to courts of error in the Middle Ages.

(To be continued)

Lawyers' Interests Advanced by Rule 16

[The Honorable Johnson J. Hayes, United States Judge for the middle district of North Carolina, addressed the judicial conference of the fourth circuit held at Asheville on June 21, 1941. Judge Hayes devoted the first part of his address to the matter of popular criticism of the legal profession and "the stately ritual of the courts." He offered as an effective remedy the new federal rules of civil procedure, and proceeded, as shown below, to tell of his first experiment with pretrial conferences. It is a sensational report.—*Editor.*]

IF it is the desire of the lawyers to retain their present field of activity and to curb this tendency to curtail it, it is my deliberate opinion that it can be done only by eliminating the hitherto inexcusable delay of cases in the court and by convincing a suspicious public opinion that we have established efficiency and speed in the dispensation of justice in the courts, both state and federal. This can be done only through earnest cooperation on the part of the members of the bench and bar. It is a matter of very deep financial concern to members of the bar and I believe this method of attack is more promising than that of trying to bar young men from the legal profession through rigid bar examinations, some of which appear to be designed for such a purpose.

Having practiced law actively, in the state courts chiefly, for sixteen years and having been on the federal bench fourteen years and being free from bias or prejudice on this matter, I do believe the recently adopted federal rules of civil procedure chart the way to put the judicial house in order and provide a way to bring about a just, prompt and final disposition of cases in court. "By your fruits are ye known" and the results will soon tell.

The legal profession, judge and lawyer alike, look askance at any innovation and feel a hallowed fellowship with the precedents of the past. Very frequently the party who is in court without a meritorious cause or defense purposely procures continuances for causes real or imaginary. There was a lawyer at a bar where I was once practicing who was able to convince his clients that a continuance was a step toward victory, and he always charged a minimum fee of ten dollars to get a continuance. Now those may have been "the horse and buggy" days, but today the court and its officers must keep pace with progress.

These federal rules were prepared by professors of law schools and members of the bench and bar whose learning and devotion to the highest ideals of our honored profession are unsurpassed. These rules represent the best up-to-date thought on the subject and have already gone a great distance toward winning public favor for federal courts. But the real worth of these rules will never be fully known until they are fully and wholeheartedly utilized. This involves thorough cooperation between the judges and the lawyers.

During the fall of 1940 I endeavored to explore the possibilities of the pre-trial conference provisions of these rules. The conditions prevailing in our district, the Middle District of North Carolina, are very similar to

those existing in all the other federal districts of the United States except those embracing large cities, for Winston-Salem, Durham and Greensboro are our largest municipalities. The volume of civil litigation is perhaps well above the average because all tax litigation is tried here, due to the location of the Collector's office in this district. It was a welcome surprise to realize that the pretrial conference was a time and labor saver to the judge, the lawyers and the litigants. While we have six places where court is held at least twice each year and the distance from my home is around 150 miles to two of the places, I experimented with a pretrial conference in every civil case on the docket at each place of holding court, at least two weeks before the cases came on for trial, and generally around thirty days.

Instead of putting the lawyers to the trouble and their clients to the expense of coming to my home for the conferences, I went to the courthouse in the division where the case would be tried. I worked out an itinerary, visiting two of the places on the same trip, and required the clerk of the federal court to notify each lawyer appearing in each civil case on the docket for the place I visited to meet me at the federal courtroom in that division at the hour and date designated, for the purpose of holding a pretrial conference and to get the case in shape for trial at the ensuing term of court.

The response of counsel was amazingly cooperative. These conferences resulted in final settlement between the parties and consent judgments in all of the cases except the four hereinafter referred to, before trial date was reached, and without the slightest pressure from the judge. I believe the trial judge should rarely, if ever, urge a compromise at the conference.

Cases which were not disposed of by judgment were discussed, the pleadings considered and stipulations were entered into, eliminating, as far as possible, everything which would delay the trial, and focusing the attention of counsel to the precise points in dispute, both as to fact and as to law.

There is a disposition on the part of some lawyers not to discuss a case with opposing counsel, perhaps fearing counsel may get the impression of an anxiety to settle where none really exists. Both are free to talk before the judgment in conference. They can talk without suggesting to the opponent a sign of weakness. Where a good lawyer meets another good lawyer in a conference that way it is not difficult to diagnose the case with reasonable accuracy and fairness, with the result that the lawyers will usually agree on a settlement, to the great joy of their clients.

We disposed of our cases on the docket for the fall term with but *one jury trial, and one trial before the judge* in which three cases growing out of the same transaction were consolidated. There was no appeal in any case to the circuit court of appeals. In other words the litigation was really ended.

The jury trial was a railroad crossing accident but the pretrial conference resulted in stipulations of fact, correction of pleadings, preparation and settlement of issues, and materially saved time at the trial. In the consolidated cases tried before the judge, the issues involved alleged malicious prosecution of the three plaintiffs in South Carolina by attaching their funds in a bank and causing them to be indicted for failure to file their names as members of a partnership in the clerk's office of the county where the business was located, which criminal proceeding was dismissed by a nol. pros. The pretrial conference resulted in stipulations embodying the judgment roll in the case where the bank (the defendant in this case) obtained the original judgment against the father of the plaintiffs in these cases, the judgment roll in the attachment proceeding in South Carolina, and the indictment, appearance bond and court entries in the criminal case, thereby dispensing with the necessity of bringing the various officers to authenticate the records and avoiding the waste of time identifying, marking and offering the evidence. The three cases were tried in one day's time where it would have taken about one week under the old way.

I have started something in our district which I intend to follow up. The government pays my travel and subsistence when engaged in this performance of my duty. I save the government the expense of jurors and court officials usually in attendance when court is in session. In conferences there are no grandstand plays for the galleries, for our hearings are informal with no by-standers. For the

first time since we began holding court in that district, I am happy to know that I have *no unfinished cases pending.* The fall's work was finished and I began 1941 with a "clean slate." During the spring terms twenty-three final judgments were signed, only one of these resulted from a jury trial. I sincerely hope other federal judges will exhaust the advantages of the pretrial conference. It will save them time, expedite the disposition of cases in their courts, save time and expense for litigants and create new confidence in our courts.

Profound Study of Young Delinquents

REVIEWED BY PROFESSOR JOHN B. WAITE*

Juvenile Delinquents Grown Up, by Sheldon and Eleanor Glueck: The Commonwealth Fund, New York, 1940; pp. VIII, 330.

"In 1934," begin the authors, "we published the results of an investigation of a thousand boy delinquents who had been brought into the Boston Juvenile Court and who had been examined, at the request of the Court, in the Clinic of the Judge Baker Foundation during the years 1917-1922, when they were of an average age of thirteen and a half years. The major emphasis in that work was on the amount of recidivism among these youths during a five-year period following the completion of the treatment that had been carried out by the Court and its affiliated community agencies. It was concerned, also, with the effectiveness of the coordination of the Court and Clinic in following the prescribed treatment, and with an analysis of the reasons why many of the Clinic's recommendations to the Court had not been followed. . .

"Some ten years have elapsed since the end of the first five-year follow-up period. What has happened to these one thousand juvenile delinquents during this time? Have they gone from bad to worse, or has the picture brightened? How account for the changes in behavior that have occurred with the passing of the years? Can the future behavior of such lads be foretold? What lessons can be learned from the manner of their development as they passed from childhood into adolescence and adulthood? How did they respond to the various types of peno-correctional treatment to which society subjected them in the course of their antisocial careers? Such questions impelled us to check the behavior of these youths as they stumbled down the corridor of time.

"In this work the searchlight is focused on the behavior of the delinquent boys during the second and third five-year periods that have elapsed since the original study was completed, and on their conduct during the various peno-correctional treatments to which they have been subjected since first coming into contact with agencies of the law. The study probes also into the reasons for such changes in conduct as have occurred in the group. It develops further than did the prior work our method of forecasting the behavior of offenders. Until now, the predictive technique has been limited to foretelling the conduct of different types of offenders following peno-correctional treatment; in the present work the prediction method is also applied to the response of the men during their subjection to varieties of treatment."

One preliminary problem which the authors had to face in each of their works was the tracing of all these persons. Much that has been written concerning the effect of penal treatment upon the subsequent conduct of persons subjected to it is unreliable and unsatisfactory because it is based too much upon inferences drawn from lack of knowledge. Court and prison records, sometimes limited to the courts and prisons of a particular locality, are found to lack any reference to some of the persons under investigation; therefore, it is assumed, those persons have conducted themselves with due obedience to law. The superficiality of such an assumption is obvious. Even if the absence of record could be taken to mean absence of criminality, it would not indicate the reason; quite possibly the individual might have been exemplary of conduct only because of confine-

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ment in a hospital for the insane, or because of enlistment and army discipline, or because of some other factor extraneous of his own personality.

The Gluecks have fallen into no such error; they have made no such dubious assumption. On the contrary, by what must have been a remarkable expenditure of effort and money and much clever detective work, they sought to follow the lives of every person concerned so closely that none of his conduct need be left to guesswork. Often the search was carried far afield from Boston. Six persons were traced in foreign countries, 7 on boats at sea, 8 were found more or less permanently confined in hospitals, 11 in the army or navy, 24 in penal institutions of other states, 112 resident outside of Massachusetts, from Maine to the Pacific coast; many of the persons sought had moved repeatedly from place to place. The ultimate result of the search was location and careful investigation of all but 47 out of the original 1000. Chapter XXI of the book, "Method of Research," is interesting reading if only for its description of the detective processes.

Upon the reliable and unusually complete data thus acquired the Gluecks were able to predicate their conclusions. Perhaps the most important of these is the fact that time itself makes conduct conform to the conventional, *i. e.* to that required by law.

"With the passing of years there has been a steady diminution in the number of youths who continued to be offenders, so that by the time our juvenile delinquents had reached an average age of twenty-nine, almost 40% had ceased to be criminals. Furthermore, even among those who continued to commit crimes, significant improvement occurred." (p. 264) Another conclusion, apparently quite justified by the data, is intriguing—the length of time that the tendency toward crime has lasted seems to determine its end, rather than the age which the individual has reached. "Apparently abandonment of criminal conduct does not occur at any specific chronological age-level, but rather after the passage of a certain length of time from the point of first expression of definite delinquent trends. On the whole, if the acts of delinquency begin very early in life they are apparently abandoned at a relatively early stage of manhood, provided various mental abnormalities do not counteract the natural tendency to maturation. . . Distribution of the delinquents into comparable proportions of persistent offenders and non-offenders occurs not at any particular age-level but rather during a quite definite period beyond the age when delinquent impulses first express themselves in antisocial acts." (p. 103)

One conclusion, however, is made ineluctable by the data compiled in this book, as it is emphasized by similar data resulting from these authors' earlier researches. The mere imposition of punishment as a consequence of crime does not effectively prevent repetition of crime by even those who have suffered the penalty. Most of those whose lives have been followed by the Gluecks after release from punishment repeated their criminality again and yet again. "Of 877 whose behavior could be checked (during the second 5 year period) 33.9 per cent had not been arrested, while 66.1 per cent had been apprehended one or more times. . . The 580 youths arrested were apprehended a total of 2547 times." (p. 43) "Of the 846 whose behavior could be determined (during the third 5 year period) 42.1 per cent were not arrested at all. (The 490 who were arrested) were apprehended 2195 times." (p. 59) When one adds to such data as these Thorsten Sellin's finding that from 60 to 80% of our prison populations consist of men who have previously been punished one or more times, and the reports of the Federal Bureau of Investigation that a third of all arrests reported to them show an average of two and a half convictions each —when one adds together such data as these the imperative need for improvement in the process of dealing with known wrongdoers becomes obvious. Eventually public protection will alter its laws and when, through conviction, it discovers persons who have demonstrated themselves to be a danger to social safety it will keep them under supervision and control for so long a time as that dangerousness appears to continue. And, still more important, while convicted criminals are under control and supervision a real effort will be made to correct their criminal tendencies and to fit them for return to freedom with safety to the public.

What Judicial Council Can Equal This Record?

Of our numerous judicial councils there is only one (California) that has any power other than advisory. The others perform their important function with no assurance that they are accomplishing good. In this article a report is made of a very high record of achievement. Can we assume that the success of the South Dakota judicial council derives largely from the fact that it is an integral part of the inclusive State Bar?

The eighth annual report of the South Dakota judicial council, published in the July, 1941, number of the official State Bar Journal, contains a summary of the council's activities which deserves every lawyer's consideration.

There appears to be only one other state in which the judicial council is on the same footing as that in South Dakota, where it is an organ of the State Bar, created and financed by the State Bar; the other state is Utah. As the following brief account will suggest, it appears plausible to hold that the integral relation of the Bar and its judicial council may account in considerable measure for remarkable achievements. The major achievements are compressed into a single paragraph, as follows:

"Chiefly the council was responsible for the reform of the jury system; for requiring notice of the defense of alibi in criminal cases; for revision of the kidnapping laws; for reduction of the minimum penalties for second offense felonies; for restoration to the supreme court of complete rule-making power; for procuring authority and funds for the revision of the state code of laws; and through its members and committees the council participated actively in some of the actual work of code and rule revision. It aided in procuring the enactment of the revised code."

The American Bar Association award of merit to the state bar which had "performed the most outstanding work during the year" preceding the annual convention of 1939 was presented to the South Dakota State Bar in recognition of its great achievement in code revision and rule-making power.

The recent report tells further of successes won in the preceding year, as follows:

"The legislature was induced to increase the effectiveness of the state parole officer by increasing his salary; amendment was obtained of the law fixing the rate of interest on redemption from foreclosure or judicial sales; amendment of law to permit the use of certified copies of foreign wills and probates; amendment of attachment law to permit (1) issuance of a limited warrant of attachment directed at specific property, (2) creating procedure for release of attached property, (3) making provision for meeting the cost of caring for attached property; amending law concerning notice to creditors; act validating defective notices to creditors and defective probating of certified copies of foreign wills and probates; providing a time limit for application for writ of certiorari in election recount cases."

The report acknowledges defeat in two matters seriously pressed—a bill to provide an index for the new code, and a bill to provide parole officers for the circuits to assist judges in making pre-sentence investigations and in supervising suspended sentences.

The list is long, but not complete, because work has been done on other important subjects. The continuous study of the operation of rules of procedure has led to recommendations for improvement submitted to the supreme court. Five amendments to substantive law, four being in the criminal field, are ready for submission at the next legislative session.

The list of achievements is extraordinary. That a state bar could induce its legislature to appropriate $50,000 for revising its code during the lean years was remarkable; that it was done in one of the least populated and most youthful states is unprecedented. But the appropriation could not have paid for the revision had not the bar voluntarily done much of the work through committees and its judicial council.

Concerning the structure of the council the report says:

The judicial council is now so constituted that its membership will consist of two supreme court judges selected by that court, two circuit judges and one county judge, selected by their

respective associate judges, the president of the State Bar, the attorney general or a deputy, the ABA state bar delegate, the dean of the Law School, a member of the legislature's judiciary committee of the preceding session, and two lawyers elected by the State Bar.

This scheme is seen to be one representative of manifold duties and interests. There is an excellent balance between ex officio and specially selected members. With its considerable number it is apparent that there must be a continuing active official, preferably the secretary, to keep the wheels turning and to keep members informed.

The office of secretary has been filled from the beginning by Judge Van Buren Perry, who is now retiring, with the recommendation that the State Bar should endeavor to get an appropriation from the State to maintain a salaried secretary and his office. Judge Perry was relieved of court attendance during the time when he was chief draftsman of the procedural code. The council has at all times had the willing services of very able members, and the constant support of the State Bar. Its secretary, by his understanding of the interrelations of law and justice, by his enthusiasm and self-sacrificing labors, has made the people of the state, as well as his colleagues of the bench and bar, his debtors.

Asked recently about the cost of maintaining this judicial council, the answer was that the cost has averaged less than $400 a year.[1] Was ever so little money so usefully expended?

Turning back to the listed achievements of the judicial council, the reader will find first the "reform of the jury system." That item deserves amplification. A request for information brought the following description of a system that should prove very interesting to the judges and lawyers of many states. It proves that a system can be devised which will assuredly afford honest jurors of at least average intelligence and experience. In what other states are these standards met? Judge Perry's description follows:

SUCCESSFUL JURY SELECTION PLAN

Prior to 1935 the method of forming the lists from which the jurors were drawn was such that the resulting jury panels were often largely composed of professional jurors, or of persons who had been placed on the list for the special purpose of sitting on a particular case or serving a particular advocate. Some lawyers made it their business to see that numbers of dependable friends were placed on every panel. Theoretically, the names were selected by the board of county commissioners, acting as jury commissioners, but it was always possible to find an obliging commissioner to include a lot of names in the list. The situation was deplorable. The judicial council caused bills to be prepared which were adopted by the legislature in 1935, quite satisfactorily curing the situation. The system is unique, and seems well adapted to rural communities like ours.

Our law is premised on these propositions:

1. Those listed for jury service should be selected because of their qualifications therefor, by reason of uprightness of character, soundness of judgment and the extent of their information.

2. The several townships or cities are entitled to pro rata representation upon the jury list.

3. The only way to prevent packing the list with men of a given occupation, classification

1. "Now as to the expenses which have been incurred by the judicial council. Our council began to function in 1933. It is a section of the State Bar, created by resolution, and is wholly financed by the State Bar. It has no capacity except to study and recommend, and no power except to persuade. The State Bar from time to time desires certain legislation to be enacted or defeated, and within the fields of procedure, it expects the judicial council, or a legislative committee thereof, to appear before the legislature and make its wishes known.

"The total cost to the State Bar for maintaining the council for the eight years it has operated is approximately $3,200.00, of which over $400.00 was spent for permanent equipment, leaving an average operating cost of about $350.00 per year. The expenses for the last eleven months have not yet been tabulated, but will be about $400.00. The total cost to August 19, 1940, was $2,779.56. This does not include certain expenses incurred by committees of the judicial council while assisting the code revisers in revising the code and rules. Such expenses were paid from a legislative appropriation. They included only actual expenses, nothing for services. The council, as a whole, attempts to meet quarterly. Subcommittees and the legislative committee meet as occasion requires. The council now has a membership of twelve. Three of them reside at the state capital, one being the attorney general and two being judges of the supreme court, while the other nine are scattered about the state. Usually the one traveling farthest picks up other members of the council residing in his line of travel, so that traveling expenses are reduced to a minimum. Four cents a mile is allowed to the one furnishing the transportation and all hotel expenses are paid. Each session of the council usually lasts one full day, but may take a day and a half or two days.

or leaning is to have the selecting done by numerous but qualified and responsible groups, and the governing boards of the townships and cities are designated as the selectors for their respective districts.

4. Conscious and deliberate selection, made under the sanctity of an oath, in a public meeting, after public notice, is calculated to secure conscientious service from the selectors.

Our law provides in substance: each May the circuit judge in each county by order determines the total number of names to be placed on the master jury list for the next following calendar year. The clerk apportions this among the cities and townships, pro rata, then makes a requisition upon each city and township clerk for double the number of names to which the district is entitled. After public notice, and after each of the members of the governing board has taken an oath that he will not place on the list the name of any person unless he believes him to be legally qualified, of upright character, and of such intelligence, information and discretion that he believes that the person would render honest and efficient service as a juror, the board compiles the district list, which is certified to the clerk of courts. The clerk summons the county auditor, treasurer and sheriff, and they, acting in rotation and by lot, draw one-half of the names returned from each district. Those not drawn constitute a reserve list, which may be resorted to by court order. Those which are drawn constitute the master list from which all jurors for all courts of record are drawn, by lot, and by the same officers, as the various courts make requisition for jury panels.

In consequence, every man on the jury list has been chosen by the governing board of his home district, whose officers have been bound by oath to select only good men. The physically, morally and intellectually unfit are almost entirely eliminated. A man may serve as a juror at only one session of court in two years. The system works quite well with us. Many of the judges make it a point to draft a letter each year, addressed to the boards of jury selectors, calling their attention to the importance of observing the spirit of this law. These letters usually accompany the requisition made by the clerk, and are usually heeded by the selectors.

Colorado Bar Gets Loose Leaf Service

A new service to members of the Colorado Bar Association began September 9 with the first issue of a semi-monthly loose leaf service. It includes six sections, each with separately numbered pages, entitled Colorado supreme court decisions, rules decisions, current developments in taxation, current legal matters of general importance, bar association events and uniform title opinions. Other sections may be added as the need arises.

Each section will be edited by a supervisor, and material for one or more sections, but not necessarily all of them, will be sent out twice a month. Binders are for sale by the Association.

Publication of Dicta, the regular monthly magazine, will be continued, and the loose leaf service will be substituted for the annual report, which will be printed in simplified form in Dicta.

Integration Stimulates Texas Bar

Judging by convention attendance figures, Texas lawyers are taking a lively interest in their new integrated bar. Registrations at the annual meeting have been increasing since the last meeting of the voluntary organization to 2,029 last year and 2,112 this year under the new system. That is one out of every four of the state's 8,000 lawyers. Only ten American Bar Association conventions have had as large an attendance.

In America the Sovereign is the People. To make the judge directly and competitively dependent upon the will of the Sovereign, that is, of transient popular majorities, and many times of minorities, revives the ancient evil of judicial subserviency and robs us of that great and dearly bought safeguard to our security—a politically independent judiciary.—*Roy V. Rhodes, Los Angeles.*

Supreme Court Justices Present Views on Bar Integration

Supreme courts figured very little in the early history of bar integration. The Judicature Society's model act, adopted first in California, provided for the complete organization of the bar. In recent years, however, legislatures have limited their participation to a grant of power to the supreme court, and certain courts have asserted their inherent power and have employed it to establish the integration status.

The attitude of judges toward integration is therefore of the utmost importance. So reasoned Walter Aitken, veteran bar leader in Montana and chairman of the Montana Bar Association's integration committee, as he prepared his address for the annual meeting in August. Mr. Aitken wrote to the chief justice of every state having an integrated bar and asked for a brief statement of opinion as to the results of integration in his state.

Twelve of the chief justices were able to answer personally, and in all of the other states but one an associate justice or some other person who was able to do so sent a prompt reply. In view of the fact that the correspondence took place during the vacation season, this must be considered an excellent response. The views expressed in these letters deserve a wider audience, and so, with the consent of their writers and Mr. Aitken, they become available to readers of the JOURNAL.

Five of the letters are not quoted for various reasons. Chief Justice Riner of Wyoming and Chief Justice O'Neill of Louisiana both pointed out that their bar organizations, completed within the past year, had not been in existence long enough to justify conclusions, although Judge O'Neill ventured a prediction that Louisiana's would be a great success. Letters from Deputy Clerk Cox of Arkansas and from Judge Douglas and Commissioner Hyde of Missouri explain the differences between integration in those states and elsewhere. The letter from North Carolina was written by Edward L. Cannon, state bar secretary, who reviewed the attitude of the court toward the state bar in cases arising before it and concluded that "the supreme court is very much interested in the work of the integrated bar and is highly sympathetic with the purposes for which it was established."

Portions of letters entirely formal have been omitted as a means of economizing space.

ALABAMA

Lucien D. Gardner, Chief Justice

"I say without hesitation that the integrated bar of Alabama has accomplished much good and has greatly clarified the atmosphere. It has worked well in this state and proven a great step forward. Though I have not the opportunity of consultation today with the members of the court, some of whom are absent at this particular time, yet I feel safe in saying that the foregoing expresses the unanimous sentiment of the membership. I feel sure also the members of the profession over the state are highly pleased with the system and throughout the years there has been no effort by legislative act to disturb it. On the other hand legislative amendments have tended to enlarge and strengthen.

"In administration of disciplinary authority the board of commissioners has been most careful and conscientious and its labors have provoked little if any adverse criticism. In our opinion the integrated bar in Alabama has proved a distinct success."

ARIZONA

Alfred C. Lockwood, Chief Justice

"The bar act has been in operation for eight years and, generally speaking, has given satisfaction to the bar of the state, although, of course, as always, there are some members who resent it as an invasion of their personal liberty, just as we still have some who do not like the strict requirements for admission to the bar now observed in this state. I can say that at least eighty-five per cent of our lawyers think that on the whole the integration has worked excellently.

"Before the integration of the bar it was very difficult to present charges of unprofessional conduct to this court, which alone has the power of disbarments in our state. The old maxim of 'What is everybody's business is nobody's business' applied most emphatically, and disbarment proceedings were almost unheard of. Under the new act a definite duty was imposed on the bar, and I am happy to say that it has taken this duty seriously and acted vigorously thereunder. As a result a number of attorneys have been disbarred, and the general standard of professional conduct has undoubt-

edly been more carefully observed by the balance of the bar.

"This court, under a statute adopted in 1939, was given the complete rule-making power in all matters, civil, probate and criminal. We exercised this power, with the assistance of committees appointed by the Bar to advise with us, and not only were their labors of great value, but the fact that the committees approved our work undoubtedly had a great deal of influence in reconciling the bar to the somewhat radical changes which we made. We have adopted the policy of refusing to amend the new rules, except in cases of great emergency, until and unless the amendment has first been submitted to the bar at its annual meeting and approved by it."

CALIFORNIA

Phil S. Gibson, Chief Justice

"Rules of professional conduct were promptly adopted and approved by the court and have been amended as occasion required since. Sections or committees of the bar to conduct specific studies have been organized and a house of delegates to represent local bar associations, together with representatives of attorneys not members of any local association, act as a clearing house for legislative and other proposals to be presented to the annual convention.

"Under the act the state bar assumed the obligation of examination and recommendation for admission to the bar of applicants, both graduates of local law schools and attorneys from other jurisdictions, thus relieving the court of an arduous task and the committees of examiners seem to have established an enviable reputation throughout the nation for fairness and efficiency.

"One notable accomplishment through state bar committees was revision of the corporation law of California, putting before the legislature a comprehensive and modern statute which was adopted in the year 1931. Another outstanding accomplishment is credited to the committee on legal publications, which by careful investigation and negotiation has substantially reduced the price of law reports and is actively continuing investigation in the field of other law publications utilized by the lawyers of the state.

"Perhaps the least pleasant task of the organized bar has been in the field of professional discipline. It has nevertheless been conscientiously performed, usually through investigation by local committees whose findings are reported first to the board of governors and thereafter in the discretion of that board presented to the supreme court for consideration and action, subject to an application and the right of full review by the court itself, based upon the record supplied by the bar. The resulting elimination from the bar of unworthy members has produced a definitely favorable reaction in the public mind toward the profession of the law as a whole.

"Many other activities might be mentioned in which the bar has labored for improvement in our laws and court procedure. I think, however, enough has been said to indicate that we believe California's action in this matter is well worthy of emulation."

IDAHO

James F. Ailshie and Raymond L. Givens, Justices

[*Note*—With a history of sixteen years the Idaho State Bar is the second oldest. Both Justice Ailshie and Justice Givens responded to the requests for opinions, and the substance of their replies appear below.]

James F. Ailshie, J.—"I was on the bench of the supreme court nearly twelve years prior to the adoption of this act and after that was in the practice for some twenty years, during which time I served as one of the commissioners under the new statute; so that I have had an opportunity to see conditions before the adoption of the law and also since its adoption; and I consider it a great improvement over the old system. It has proven very helpful both to the profession and the courts in this state. We find that lawyers elected to administer the law will really give more attention to the matter as commissioners and will act with more strictness with their requirements of observance of the ethics of the profession than some of the courts used to do.

"The method of investigating cases is speedy and simple. Anyone may prefer charges against an attorney; he may do so simply by letter. Such correspondence is kept secret with the commissioners and is privately investigated by the commissioner from whose district complaint comes. After investigation and discussion among the commissioners, if it is concluded that the charge is groundless, no further action or proceedings are taken. If, on the other hand, it is deemed of sufficient importance to justify an investigation, the matter is referred to the prosecuting committee for preferment of charges. In this way, an attorney is protected against false accusations and blackmail, while on the other hand, if the charges are substantial the profession and the courts are protected by speedy hearing and decision."

Raymond L. Givens, J.—"For several years no avowed adverse comments have been voiced, at least generally, and this silence would seem indicative of universal approval and that the bar favors this type of organization.

"You will notice that while the court approves the rules the bar itself elects the commissioners and they have universally been lawyers of the highest professional ability and standing and have given unstintingly of their

time and thought to the strengthening and development of the organization.

"There has been a marked increase in attendance at and interest in state and local bar association meetings each year since 1923, and enlarged participation in discussion and keen constructive analysis of live topics, thus stamping this as the *lawyers' organization.* Such integration has tended to knit the lawyers as a unit into an effective force, recognizing and living up to their responsibilities.

"The bar almost unanimously approved an increase in bar fees from $5.00 to $7.50 two years ago, more nearly providing adequate funds, always a serious handicap, especially in financing the rather expensive disciplinary proceedings unfortunately occasionally necessary. These dues are not unduly burdensome on the individual.

"The last session of the legislature recognized the power of the court to promulgate rules of procedure supplanting our code of civil procedure and a committee of the bar appointed by the court is now engaged in formulating tentative rules correlated, if not similar, to the rules of civil procedure in the federal district courts.

"Under the integrated bar the commissioners have been especially interested in preserving the integrity and standards of the bar on a high ethical plane which of course redounds to the benefit of the entire profession."

KENTUCKY

Gus Thomas, Judge

"The unanimous opinion of all the members of this court as well as practically all the members of the bar is that they are most highly pleased with the results of our statute as elevating its membership and likewise weeding out many members who had long since deserved such action. Since the passage of the act the annual convention of the state bar association is an entirely different meeting than what it previously was. The attendance has increased three or four or five hundred per cent with corresponding interests in the well gotten up programs. District associations hold meetings in their territories where the members of the bar within that area gather together and discuss matters in which the profession is interested, and upon the whole we all regard the passage of the act as a most important forward step in the improvement of the profession and for which reason we do not hesitate to recommend that the legislature of each state follow our example and like action on the part of other states in the immediate passage of a similar law."

MICHIGAN

Walter H. North, Justice

"After a number of years of unsuccessful effort by the bar of Michigan, the supreme court in the exercise of its constitutional supervisory powers took action in 1935 which created the integrated bar of this state. At that time there existed rather substantial opposition to the innovation; but I feel justified in saying that the beneficial results have been such that now the Michigan bench and bar almost unanimously approve the step taken.

"I will not burden you with an attempt to recite in detail the results accomplished, but merely mention the following. The Michigan integrated bar is admittedly much more representative of our profession than the former state organization which was largely controlled by a few active groups. Membership is now compulsory. Attendance at meetings is very much larger than formerly, and the control and management of activities is equitably distributed throughout the state. Political lines are wholly disregarded. Excellent work has been done in the way of self-discipline of the bar, and effective results accomplished in curbing the unauthorized practice of law.

"In writing as above I speak only for myself, but I have not the least doubt that the other seven members of the Court, if present, would fully concur."

NEBRASKA

Edward F. Carter, Justice

[*Note*—The first bar association address devoted wholly to integration was delivered in 1914 at Lincoln, Nebraska. It did no harm to the existing structure of government or of society. The few unrelenting friends of integration in the Nebraska Bar were able in 1937 to boast that their state was the first to create an inclusive bar, with all its powers and appurtenances, entirely by a supreme court rule. The court opinion may have been very persuasive as well as timely in assisting the Oklahoma supreme court to place its state's bar on a like single and certain foundation.]

"At the outset I want to say that I have been an advocate of complete bar organization since the matter first came up in Nebraska. I have not found a single reason for changing my views.

"When Nebraska first integrated its bar by supreme court rule in 1937 there was, of course, considerable opposition to it. During the past two or three years, opposition has waned until one seldom hears any mention made of it. In my judgment, bar integration has proved its merit in this state.

"The most notable results have been the added interest that all lawyers now take in the bar association; improved attendance in the state and district meetings; a great interest in legal institutes now conducted within the state; the progress obtained in procedural simplification and reform; the procurement of adequate funds for the bar's program of pro-

fessional advancement, a general improvement in the ethics of the profession brought about by a bar supported disciplinary procedure which affords full protection to the innocent and more certain punishment to the guilty; and a tendency toward better educational and character requirements for those admitted to the practice of law.

"We in Nebraska naturally think that integration by court rule is to be preferred over that by legislative act. It is not my purpose to discuss this question, but the experience of the Oklahoma state bar association could well be examined before the merits of this question are finally determined.

"Whether bar integration would work in Montana under the conditions there existing is a question I am not called upon to discuss. But in Nebraska, bar integration is generally considered by the bar to be a great success."

NEVADA

E. J. L. Taber, Justice

"The judges of our court are of the opinion that bar integration has been beneficial in many respects. Perhaps most of the opposition to the program has come from those who have experienced difficulty in obtaining admission to practice or have come under the discipline of the grievance committee and board of governors.

"We think it is preferable to accomplish integration by court rule rather than by legislative enactment permitting or requiring it. In Nevada, however, bar integration has been brought about by act of the legislature. Experience has shown that sometimes when the state bar incurs the displeasure of an unsuccessful candidate for admission or that of some attorney who has been disciplined, attempts are made at the ensuing session of the legislature to obtain some modification if not the entire repeal of the state bar act. We feel that there would be greater stability if integration were brought about by rule of court.

"We believe it to be the opinion of the great majority of the high standing members of our state bar that integration has led to a great improvement and advance in the general character, ability and integrity of the state bar as a whole. We think that most of the members of the state bar in Nevada, particularly those in higher standing, would not consider for a mement abandoning our integrated bar.

NEW MEXICO

A. L. Zinn, Justice

"Bar integration was accomplished in the state by an act of the legislature in 1925. That act attempted to place authority in the board of commissioners of the state bar, among other things, to suspend or disbar a lawyer. Our court held that only the court could do this. With this exception the bar of New Mexico has been functioning under this act, Sections 9-201, et seq., N. M. S. A., 1929 compilation. Personally, I feel that it has been a success and a great improvement over the old system of membership in a voluntary bar association. Machinery is provided for the hearing and disposition of complaints against attorneys with dispatch and the supreme court receives the benefit of the conclusions and recommendations of the board of commissioners, which board is selected by all the members of the bar of the state.

"I believe also, that the integrated bar is due the credit for improving the standards and requirements for admission to the bar of the state which is resulting in a better equipped and improved personnel from the standpoint of qualifications and character. The organization as a self-governing body appears to me to be in a better position to accomplish these things through its elected representatives than is the supreme court.

"In writing this letter I am speaking only for myself although I believe that the other members of the court probably feel as I do."

NORTH DAKOTA

A. G. Burr, Chief Justice

[*Note*—The North Dakota bar has proved its right to be known as the leader in the integration movement. Mr. John E. Greene, the memory of whom is revered, learned of integration from North Dakota's Canadian neighbors. In the provinces the bar always had been a part of government. He learned also of the Judicature Society's proposals when he was a delegate to a session of the Conference of Bar Association Delegates, presided over by Mr. Elihu Root, in 1919. Two years later the North Dakota legislature enacted the first inclusive bar law, a consequence of Mr. Greene's planning, but a considerable departure from his proposals.]

"Of course, the mere fact that an association is organized by law does not assure it will be successful; but after twenty years' experience, and after comparison with the results of the voluntary association which preceded it, I believe we can arrive at a fair estimate of the merits.

"We do not disparage the work of the voluntary association. The men who formed that association, who attended its meetings and conducted its affairs were among the leaders of the bar; but being voluntary in its nature, its membership was small in comparison to the number of practicing lawyers. Under the present system, every practicing lawyer in the state is a member. If he makes no attempts to exercise any influence, that is his own fault.

"Another factor which I believe is apparent

after twenty years' experience is that the younger lawyers take more interest in the work, and attend. They are members, and naturally feel a duty to exercise their rights. There is less liability of the work of the association falling into the hands of a self-perpetuating coterie, although I would not for a moment intimate that there was any such coterie in our voluntary association.

"Another factor which is of some importance is that under the old system, the bar association could not speak with authority as representing the lawyers. Today when the bar association takes official action, it speaks for the bar. Slowly such action must raise eventually the influence of the bar with the general public, although, to be candid, I doubt whether the public today cares very much whether the bar is organized or works under a purely voluntary system.

"I read your letter to the court this afternoon, at our conference, and each member of the court expressed himself quite freely as being in favor of our present system. We feel it has a better effect upon the bar in general and tends to create a unity of purpose and of action. The distribution of the membership of committees has always been very fair. Any lawyer desiring to be of service through the Association may find a place on the committees. Of course, the work of a committee depends upon its personnel. If a man is a mere ornament, it does not make any difference whether the association is voluntary or official.

"Personally, I believe the tendency will be to enhance the reputation and the influence of the bar. Such matters are of slow growth, but when the lawyers speak through the association they speak with more dignity, impressiveness and with less selfish interest than otherwise. This naturally will have its influence upon the public in the long run."

(To be continued)

Review of Judicial Council Reports

CALIFORNIA

Superior court judges in California draw salaries ranging from $4,500 to $10,000 a year, and have work loads as high as 571 and as low as 21 cases disposed of per judge per year.

These figures are from a survey of judges' salaries and duties made by the judicial council at the request of the 1939 legislature, and are published in the eighth report, for the 1938-40 biennium. The legislature also asked the council to draft a judges' salary bill, but the council, created not by act of legislature or court but by constitutional amendment, considered this not within its constitutional functions.

The report shows substantial increases in municipal court litigation, particularly domestic relations cases. It renews its earlier recommendation for a third division of the second district court of appeal, serving the Los Angeles area, and recommends revision of California civil procedure to conform to the new federal rules. It publishes a number of amendments to the superior court rules adopted and promulgated by the judicial council under its own rule-making power.

The financial report shows an appropriation of $18,000 for the biennium, one of the most liberal in the country, but part of it was used to compensate judges assigned by the council to various courts for emergency service.

Phil S. Gibson, chief justice of the supreme court, is chairman of the council, succeeding former Chief Justice William H. Waste, who is honored in this report by a review of his work on the council during its first thirteen years. B. Grant Taylor is secretary.

PUERTO RICO

The Judicial Council of Puerto Rico was organized on June 29, 1939, and immediately evidenced its serious intentions by dispatching two representatives to the national conference of judicial councils the following month. The council held monthly meetings for the remainder of that year and formulated a legislative program consisting of ten bills. One of these was to authorize the supreme court to make rules of procedure with the assistance of the judicial council as an advisory body. Another was to create the office of public defender, and the other eight were specific procedural improvements which the council thought important enough to propose without waiting for passage of the rule-making bill.

Such was the situation on December 1, 1939, the date of the first report. This year the reports of 1939 and 1940 were published in one

pamphlet. The latter adds six more bills to the legislative recommendations and reports passage of three, including the public defender bill. It strongly renews the recommendation that rule-making power be given to the supreme court.

Chief Justice Emilio del Toro is president of the council, and Mariano Acosta Velarde is secretary.

MICHIGAN

In contrast with the extensive studies that have characterized previous annual reports of the Judicial Council of Michigan, the eleventh report issued in June, 1941, is limited to judicial statistics only. This is no doubt due to the discontinuance of the financial support of the William W. Cook Foundation and the failure of the 1939 legislature to make an appropriation in its place.

The 1941 legislature put the future of the judicial council on a sound basis. It appropriated $2,500 for each of the two fiscal years of the biennium, and it amended the act creating the council to provide for the study of substantive law as well as procedure and other phases of judicial administration. Such an extension of scope is unique in the history of the judicial council movement. Its nearest parallel is the Louisiana Law Institute, which performs the functions of a judicial council for that state and carries on a similar program.

The 1940 statistics show decreases in the civil dockets of the circuit courts, and increases in chancery and criminal cases. The same trends are evident in a nine-year summary which shows 4,321 less civil, 1,247 more criminal and 12,548 more chancery cases on the docket now than in 1932. The supreme court had a decline in business, with 408 opinions, 51 per judge, as against 427 opinions, 53.4 per judge, the previous year.

The results of pretrial procedure in the Wayne County circuit court become more striking each year. Percentage of cases ready for trial but disposed of on pretrial hearing without trial during the past six years follows: 1935, 40.6; 1936, 49.5; 1937, 55.1; 1938, 60.5; 1939, 57.6; 1940, 64.2.

Henry M. Butzel is chairman of the council and Edson R. Sunderland is secretary.

The Lawyer and the Emergency

It does seen somewhat of a reflection on our system that at a time when everything should be subordinated to defense, we find some people using technical legal rights in a way that delays defense preparation. For example, the construction of a great modern roadway system, with access to defense plants, may be held up because of the law delays in obtaining rights of way. The lawyer's resourcefulness is needed to find the way to protect the citizen in his right, and at the same time, to give speedy action when the nation needs results. If more *arbitration* and less *procrastination* is the answer, the lawyer should know it and call for it, until the emergency is over.

—*Herbert O'Conor.*

The Judicature Society Invites Cooperation

The American Judicature Society is an agency for cooperation between all persons who are concerned with the problems of administering justice; for all who realize the need of more effective methods and results in keeping with the standards of modern life. To such persons, the Society offers opportunity for a high form of public service. The Journal of the Society is in the nature of an open forum; contributors are not asked to subscribe to any creed. The Journal is sent free to all who are interested. For those who desire more than passive participation there is an active membership, with dues of five dollars a year, and a sustaining membership for those who place a higher estimate upon their responsibility.